IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 352

GENERAL MOTORS CORPORATION, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INDEX

CASES CITED

STATUTES

PUBLICATIONS

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Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, Associated Industries of New York State, Inc. respectfully moves this Court for leave to file the accompanying brief in support of the petition by General Motors Corporation for a writ of *certiorari* in the instant case. Counsel for petitioner has stated that petitioner consents to the filing of this brief, but counsel for the respondent has refused.

Associated Industries of New York State, Inc. has since its founding in 1914 served as the "voice of industry" in the nation's largest industrial state. The association has approximately 1400 member companies having offices and plants in every part of the State of New York. Both manufacturing and non-manufacturing companies, representing total business activity of many billions of dollars annually, are included within the membership.

A great many members of the association manufacture goods in New York which are then sold to customers in the District of Columbia as well as to customers throughout the 50 states. For the years in question, 1957 and 1958, an informal survey of a small but representative group of member companies engaged in manufacturing revealed that a majority of them made sales to customers in the District of Columbia. Sales to such customers made by companies in the small group surveyed amounted to approximately $100,000,000 in each year.

The State of New York imposed a franchise tax measured by net income during the years in question and the sales of goods manufactured in New York and sold to customers in the District were included in the tax base in New York. The interpretation in the instant case by the Court of Appeals for the District of Columbia of the District of Columbia Corporation Income and Franchise Tax Act and of the regulations promulgated thereunder means that these same sales, taxed by the State of New York under its apportionment formula, are now taxable by the District of Columbia on 100% of the net income. Such an interpretation, if not overturned, constitutes an open invitation to other jurisdictions to enact similar one-factor

sales formulae, thus subsidizing intrastate business by burdening interstate commerce with discriminatory and multiple taxation.

The Applicant association thus has an interest in this case by reason of the substantial effect of the decision of the Court of Appeals for the District of Columbia upon its member companies, not only with respect to their commerce into the District of Columbia but also into other jurisdictions as well. The Applicant wishes to clarify the presentation of the important statutory and constitutional questions presented by this petition for *certiorari* as they relate to its members and to show the far-reaching effect of this decision on the interstate commerce of a substantial segment of American industry.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.

QUESTIONS PRESENTED

1. Whether the single-factor sales formula for apportionment of net income prescribed by the Commissioners of the District of Columbia purportedly under authority of the District of Columbia Income and Franchise Tax Act of 1947 violates the due process clause of the 5th Amendment to the Constitution or the commerce clause of the Constitution where the application of the formula results in taxation by the District of 100% of the net income of a foreign corporation derived from the manufacture and sale of products without the District to customers within the District.

2. Whether the adoption by regulation of the District Commissioner of a single-factor sales formula which allocates to the District 100% of the net income from the manufacture and sale of products without the District to customers within the District is permitted by the District of Columbia Income and Franchise Tax Act of 1947.

ARGUMENT

Your Applicant views this case as one of signal importance in the harmonization of competing demands by the various taxing jurisdictions, including the District of Columbia, upon unitary manufacturing and selling concerns doing an interstate business.

This Court in *Northwestern States Portland Cement Company* v. *Minnesota,*[1] has established that states may tax the net income of exclusively interstate commerce where a sufficient nexus is established provided the net income is "fairly apportioned." Some 38 states and 95 municipalities now impose taxes on, or measured by, net income of corporations.[2] New York can be counted within this group.[3] While many of these jurisdictions have adopted apportionment formulae fairly similar to the three-factor formula approved in *Northwestern States Portland Cement Company, supra,* others have devised formulae of their

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[1] 358 U.S. 450 (1959).

[2] "State Taxation of Interstate Commerce," Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary of the House of Representatives, pursuant to P.L. 86-272, as amended, H.R. Rep. No. 1480, 88th Cong., 2d Sess. 99, 447 (June 15, 1964).

[3] Id., p. 103; McKinney's Consolidated Laws of New York, Ch. 60, Art. 9-A, Sections 208-210 (1954).

own.[4] The possibility of discrimination against and burden upon interstate commerce as a result of the inter-relationships of varying formulae quite obviously was foreseen by this Court when it required net income to be "fairly apportioned." While this Court has given some indications of the general outlines of fair apportionment,[5] it has not had before it a case sufficiently blatant to set the outer bounds of constitutionality of an apportionment method. The instant case offers the Court such an opportunity.

The effect of the decision of the Court of Appeals for the District of Columbia in this case is to permit a state or municipality where an interstate manufacturer and seller's customers are located to tax the entire net income of the interstate taxpayer arising from sales to customers in the taxing jurisdiction even though the interstate manufacturer and seller's principal operations take place outside such jurisdiction. If allowed to stand, this decision can only serve as an open invitation to many states and municipalities to impose a tax on the entire income from all sales to their inhabitants. The temptation to tax the foreign corporation while subsidizing domestic manufacturers would be almost irresistible and the result would be obvious

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[4] Id., pp. 168-192. New York's formula, for example, for the years in question was a more complicated version of the *Northwestern States'* formula. McKinney's Consolidated Laws of New York, Ch. 60, Art. 9-A, Sections 208-210 (1954). Approved in *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U.S. 271 (1924).

[5] *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113 (1920); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U.S. 271 (1924); *Butler Bros.* v. *McColgan*, 316 U.S. 501 (1942); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959).

discrimination against interstate commerce. The prospect of cumulative multiple taxation on the same income is equally obvious. The undesirable results which would flow from the decision of the Court of Appeals for the District of Columbia demonstrate either that the application of the statute as interpreted by the District Commissioners and the Court of Appeals is unconstitutional or that the interpretation of the statute is erroneous.

This Court has many times said that the commerce clause, the 5th Amendment and the 14th Amendment prevent imposition upon interstate commerce either of discriminatory taxation to which intrastate business is not subject or of the cumulative burdens of multiple taxation to which, again, intrastate business is not subject.[6] This Court has given tacit approval to a number of formulae for apportioning net income on the basis of multi-factor formulae including property, payroll and sales including several similar to that used by the State of New York.[7] If these latter formulae constitute "fair" apportionment, the District of Columbia one-factor sales formula cannot also be fair because it necessarily results in double taxation when goods sold are delivered to customers in the District from a stock in New York. This can be demonstrated quite easily

[6] The cases are collected and analyzed in the majority opinion of Mr. Justice Clark in *Northwestern States Portland Cement Co.* v. *Minnesota, supra,* at pp. 458-465. While the commerce clause does not restrict Congress in its power to legislate for the District, it does apply to the District Commissioner. *District of Columbia* v. *John R. Thompson Co.,* 346 U.S. 100, 107 (1953).

[7] *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission,* 266 U.S. 271 (1924); *West Publishing Company* v. *McColgan,* 328 U.S. 823 (1946); *Northwestern States Portland Cement Co.* v. *Minnesota, supra.*

by even a cursory reference to the New York statute. In 1957 and 1958, New York imposed a franchise tax on business corporations for the privilege of doing business in the State of New York.[8] The tax was basically measured by "entire net income" or the portion thereof allocable within the state. Entire net income was allocated to New York on the basis of a three-factor formula consisting of ratios of (a) average value of real and tangible personal property within the state to average value of such property everywhere, (b) gross receipts from the sale of tangible personal property located within the state and sales of property not within the state and not located at one of the taxpayer's permanent and continuous places of business outside New York if the order was received or accepted within the state plus other business receipts earned within the state to total receipts from all such items everywhere and (c) wages and personal compensation of employees within the state to such compensation everywhere. It is quite clear that New York includes in its tax base the net income from the sale of tangible personal property manufactured within the state and sold to District of Columbia customers. However, it is equally clear that New York weights the sales factor as only a part of the total business activity generating the entire net income.

On the other hand, the Court of Appeals' decision approving the single-factor sales formula of the District Commissioners' regulation allocates the entire net income from the sale of tangible personal property to a customer in the District by a unitary manufacturing

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[8] McKinney's Consolidated Laws of New York, Ch. 60, Art. 9-A, Sections 208-210 (1954).

and selling operation to the situs of the customer, specifically to the District. The District Commissioners appear to have pushed the fair apportionment concept to the breaking point. In fact, the single-factor sales formula is no apportionment at all. It is merely direct allocation of the entire net income to the situs of the customer. Paraphrasing Mr. Justice Clark's statement in *Northwestern States Portland Cement Co., supra,*

> "This is an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share."

It is submitted that the regulation of the District Commissioners violates the spirit of the "fair apportionment" concept and should be struck down before other jurisdictions make the same attempt.

The second question presented is whether, aside from any constitutional problems raised by its decision approving the use of a single-factor sales formula, the Court of Appeals for the District of Columbia properly interpreted the District of Columbia Income and Franchise Tax Act of 1947. On this question, it is submitted that, as found by the District of Columbia Tax Court, the statute neither requires nor permits the use of a single-factor sales formula. Accordingly, to enforce the "fair apportionment" concept developed by this Court, it would not be necessary to invalidate the statute on constitutional grounds.

CONCLUSION

It is respectfully submitted that the issues presented in the instant petition for writ of *certiorari* involve substantial federal constitutional and statutory ques-

tions. This *amicus curiae*, therefore, urges the Court to grant a writ of *certiorari* herein.

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